

STATE OF CALIFORNIA
BOARD OF EQUALIZATION

465.0545

In the Matter of the Petition)
for Redetermination Under the)
Sales and Use Tax Law)
)
G--- A---)
T-- CORP.)
)
Petitioner)

REVISED
DECISION AND RECOMMENDATION
No. SR -- XX XXXXXX-010

The preliminary hearing on the above petition for redetermination was held on January 15, 1985 in Sacramento, California

Hearing Officer: H. L. Cohen
Appearing for Petitioner Mr. C. W---, Jr., Attorney at Law
Mr. R. F---, Attorney at Law
Ms. S. P---, Assistant Tax Attorney
Appearing for the Board: Mr. J. Warner, Principal Auditor
Out-of-State District

Protested Item

The protested tax liability for the period January 1, 1976 through June 30, 1979 is measured by \$2,416,967.

Contention

Petitioner contends that the amount upon which the tax has been asserted is excessive and that the assertion of tax is barred by the statute of limitations.

Summary

Petitioner is a corporation engaged in the manufacture, lease and repair of rail cars. Initially, a notice of determination was issued June 18, 1982, for tax on unreported taxable amounts totaling \$1,122,861. Petitioner protested the assertion of tax on the material cost of tank cars leased to proprietary carriers (Audit Item I). The tax was asserted on the basis that the cars were used primarily in intrastate commerce. The amount upon which the protested tax was based was \$684,526. Petitioner filed a timely petition for redetermination.

A preliminary hearing was held before Susan M. Wengel, Hearing Officer, on November 22, 1982. Ms. Wengel found that the tax was properly applied and recommended that the matter be redetermined without adjustment. Ms. Wengel's recommendation was mailed to petitioner under cover of a letter dated March 18, 1983. Petitioner thereupon requested an oral hearing before the Board.

Petitioner was scheduled for hearing before the Board several times and requested postponements, which were granted by the staff. Petitioner was then scheduled for hearing before the Board on December 15, 1983. Petitioner again requested a postponement, but the staff declined granting a postponement. Petitioner met with Mr. W. E. Burkett, Supervisor of Hearing Officers, on that date and submitted additional evidence to him. He concluded that this evidence supported some reduction in the tax asserted. Accordingly, he requested that the Board grant a postponement to petitioner. The Board granted a postponement to permit the staff to review the additional evidence offered by petitioner. Petitioner did not appear before the Board. Petitioner was advised of the basis for further review by letter from Mr. W. E. Burkett. A reaudit was initiated on the basis outlined.

During the course of the reaudit, the auditor found grounds for asserting additional tax. In a reaudit report dated July 13, 1984, an adjustment in the amount subject to tax of \$232,153 was made with respect to the original audit. Additional tax was asserted based on \$2,416,967 in repair parts consumed by petitioner. By letter dated July 23, 1984, signed by J. D. Dotson, Assistant Executive Secretary, Business Taxes, petitioner was notified that additional tax was asserted under Section 6563 of the Revenue and Taxation Code.

On July 17, 1984, the Board received from petitioner payment in full of the amount shown on the notice of determination (including all previously contested amounts), together with a notice from petitioner that the petition for redetermination was withdrawn. We note that this was after the date of the audit report, but before the letter from Mr. Dotson.

By letter dated August 3, 1984, petitioner contested the authority of the Board to seek the additional amount of tax after the petition for redetermination had been withdrawn. Petitioner also stated that there were substantive grounds for contesting the amounts, but that it wished to contest only the procedural grounds initially. The preliminary hearing which is the subject of this Decision and Recommendation was held in response to the protest presented in the letter of August 3, 1984.

Petitioner argues that the withdrawal of the petition for redetermination closes the matter, and that since the assertion of additional tax was made after the matter was closed, that assertion is barred by the statute of limitations. The limitation period was held open only by the pendency of the petition for redetermination. Petitioner contends that it was unfair of the auditor to hold the limitation period open while reauditing on an agreed issue in order to assert additional tax on a different issue.

Petitioner also argues that the letter from Mr. Dotson is not a proper notice of a deficiency. Since petitioner has not received proper notice within the statutory limitation period, the Board is barred from asserting the tax.

Analysis and Conclusions

Section 6561 of the Revenue and Taxation Code provides that a person against whom a determination is made may petition for a redetermination within 30 days after service of notice thereof. If a petition for redetermination is not filed timely, the determination becomes final at the expiration of that period. If not paid at that time, a penalty of 10 percent must be added. See Section 6565.

Petitioner filed a petition for redetermination timely. This prevented the determination from becoming final at the end of the thirty-day period.

Section 6562 provides that if a timely petition for redetermination is filed the Board shall reconsider the determination and, if the person so requests, shall grant the person an oral hearing. Petitioner disagreed with the recommendation of the hearing officer and requested an oral hearing before the Board.

Section 6563 provides that the Board may decrease or increase the amount of the determination before it becomes final, but the amount may be increased only if a claim for the increase is asserted by the Board at or before the hearing. The increase here was asserted prior to any hearing before the Board. The issue raised by petitioner is whether petitioner can by unilateral action cause the original determination to become final. We think not. The purport of the several actions in Article 5, Redeterminations, (Section 6561 et seq.) is that once a petition for redetermination is filed, the determination is held in abeyance pending some further action by the Board. That further action is redetermination. The withdrawal of a petition by a taxpayer merely permits the Board to redetermine a matter without further review; it does not itself cause redetermination or require the Board to redetermine immediately.

While we do not question petitioner's good faith in requesting and obtaining postponements of its scheduled hearings before the Board, the result is that payment was delayed, legally of course, without incurring the 10 percent penalty. Clearly the appeal procedure is not intended to permit a taxpayer to delay payment and still retain the option of unilaterally preventing action by the Board. Section 6563 would have little or no meaning if petitioner's view were adopted because as soon as a taxpayer became aware of the possibility of an increase, he would have the power to close the matter unilaterally. It goes without saying that the Board could not legally keep such information from the taxpayer. We conclude that the matter, once opened by a petition for redetermination, cannot be closed without the issuance of a redetermination.

Having decided that an increase can be asserted at or before the oral hearing regardless of any action by a taxpayer, we next turn to the question of whether the claim for increase was properly issued. The sections dealing with determinations (6481 et seq., 6511 et seq., and 6536 et seq.) speak directly in terms of determinations and the issuing of determinations. Section 6563 speaks

in terms of a claim for an increase. We believe the letter from Mr. Dotson does in fact make a claim in accordance with the requirements of the statute. The statutes dealing with determinations as well as section 6563 speak in terms of the Board issuing such documents. The Board has delegated to staff the power to issue such billings. The Board, as distinguished from the staff of the Board, does not directly issue determinations. The delegation of authority to issue claims for increases in determinations is just as valid as the delegation of authority to issue determinations.

Having concluded that petitioner's procedural objections are without merit, it will be necessary to hold a supplemental hearing to consider petitioner's substantive objections. The supplemental hearing will be held within 60 days of the date of the cover letter of the Decision and Recommendation. Petitioner should contact the hearing officer promptly to arrange a mutually satisfactory time and date.

Recommendation

Proceed with supplemental hearing on substantive issues. Petitioner to contact hearing officer to arrange mutually satisfactory time and date.

H. L. Cohen, Hearing Officer

2-14-85

Date